IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN DOE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**NO. 04-CV-2427**
	:	
REV. ALBERT M. LIBERATORE, JR., DIOCESE OF SCRANTON, SACRED HEART OF JESUS CHURCH, BISHOP JAMES C. TIMLIN, REV. JOSEPH R. KOPACZ and BROTHER ANTONIO F. ANTONUCCI,	:	**JUDGE CAPUTO**
	:	
	:	**ELECTRONICALLY FILED**
	:	
	:	
	:	
	:	
Defendants.	:	

PLAINTIFF'S TRIAL BRIEF

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I. Child Abuse Victims' Rights Act

The Child Abuse Victims Rights Act, 18 U.S.C. § 2255, provides a vehicle for minor victims of sexual abuse to sue in federal court for damages sustained as a result of the abuse. The statute, as amended on July 27, 2006, provides in relevant part:

> Any person who, while a minor, was a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

18 U.S.C. § 2255(a). Plaintiff John Doe ("Doe") is a victim of violations of 18 U.S.C. §§ 2421, 2422(a), 2422(b), 2423(a), 2423(b) and 2423(c) and suffered

personal injury as a result and is therefore entitled to recovery of damages under 18 U.S.C. § 2255(a). Defendant Rev. Albert M. Liberatore, Jr.'s guilty pleas constitute conclusive proof of the facts alleged in the criminal charges and therefore constitute conclusive proof of the crimes which form the basis for Doe's claim under the Child Abuse Victims' Rights Act. See Commonwealth, Dep't of Transp. v. Mitchell, 517 Pa. 203, 210-12, 535 A.2d 581, 584-85 (1987) (conviction stemming from guilty plea is equivalent to conviction after jury trial and is admissible in civil case as conclusive proof of facts alleged in criminal charge).

II. Assault and Battery

Pursuant to the Restatement (Second) of Torts § 21(1), a defendant may be held liable for assault if:

> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.

Nardella v. Dattilo, 36 Pa. D. & C.4th 364, 369 (Dauphin County 1997) (quoting Restatement (Second) of Torts § 21(1)); see also Sides v. Cleland, 436 Pa. Super. 618, 626, 648 A.2d 793, 796 (1994), appeal denied, 540 Pa. 613, 656 A.2d 119 (1995).

In accordance with the Restatement (Second) of Torts § 13, a defendant commits a battery if:

> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.

Nardella, 36 Pa. D. & C.4th at 370 (quoting Restatement (Second) of Torts § 13)). Unlike assault, the actor must achieve a harmful or offensive contact with another person to commit a battery. Id.; see also Field v. Philadelphia Elec. Co., 388 Pa. Super. 400, 416-17, 565 A.2d 1170, 1178 (1989).

Inappropriate sexual contact between a priest

and a parishioner may properly give rise to claims for assault and battery. See Nardella, 36 Pa. D. & C.4th at 370-71.

III. Negligent Supervision and Retention

Employers in Pennsylvania have a duty to exercise reasonable care in selecting, supervising and controlling employees. See, e.g., Hutchison v. Luddy, 560 Pa. 51, 742 A.2d 1052 (1999). The basis for such a claim is Section 317 of the Restatement (Second) of Torts which provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the

> servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317.[1] Comment c to that

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[1] Section 213 of the Restatement (Second) of Agency also recognizes an employer's duty to properly select employees. See Dempsey v. Walso Bureau, Inc., 431 Pa. 562, 568, 246 A.2d 418, 421 (1968). That section reads as follows: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; (c) in the supervision of that activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." The comment under that section states: "An agent, although otherwise competent, may be incompetent because of

section provides:

> Retention in employment of servants known to misconduct themselves. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every effort to prevent their misconduct by the exercise of his authority as master.

Restatement (Second) of Torts § 317 at Comment c.

The Pennsylvania Superior Court addressed a claim of negligent supervision in Coath v. Jones, 277 Pa. Super. 479, 419 A.2d 1249 (1980). The employee in Coath raped the plaintiff after having gained entry into

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his reckless or vicious disposition, and, if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity."

her home by representing that he was there at his employer's direction and on his employer's business. The plaintiff alleged that the employer knew or should have known of the perpetrator's propensity for violence against women and was therefore negligent in hiring and retaining the perpetrator. The trial court sustained the employer's preliminary objections to the complaint and the Superior Court reversed. The Court explained that "the defendant could be found negligent if [the employee] was known to have the inclination to assault women or if the defendant should have known that." Id. at 483, 419 A.2d at 1250. The Court relied in part on Section 302B of the Restatement (Second) of Torts which provides:

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of a third person which is intended to cause harm, even though such conduct is criminal.

Restatement (Second) of Torts, § 302B.

The Pennsylvania Supreme Court considered a negligent hiring claim in the context of clergy sexual abuse in Hutchison v. Luddy, 560 Pa. 51, 742 A.2d 1052 (1999). The plaintiff in Hutchison claimed that he was molested by a priest for a number of years, both in the priest's rectory bedroom and on at least two occasions in a motel room. He brought suit against the priest, the church to which the priest was assigned, the diocese and the bishop of the diocese. He claimed, inter alia, that the diocese and bishop knew or should have known that the priest was predisposed to engage in pedophilic behavior and therefore owed a duty to prevent the priest from having contact with children. The jury found in favor of the plaintiff. The Superior Court reversed the jury's verdict, holding that the plaintiff had failed to establish liability under Section 317. The Supreme Court reversed and held that the jury could reasonably have found liability under that section. The Supreme Court was persuaded by the facts that the bishop and diocese knew that the priest had a propensity for

pedophilic behavior and were aware of several specific instances of such conduct. They also knew that placing an abusive priest in a position in which he would have contact with children would afford him ample opportunity to commit further acts of abuse. Accordingly, they had a duty to take appropriate precautions to prevent the priest from molesting more children, e.g., by assigning him to a position in which he would not have any contact with children, by ensuring that he sought treatment or by terminating his employment altogether. The Court explained:

> Bishop Hogan and the Diocese . . . did not attempt to prevent the foreseeable harm, and instead undertook a course of conduct that increased the risk that Luddy would abuse Michael and other children. Instead of keeping him away from children altogether, they disregarded Luddy's misconduct and allowed him to have unsupervised contact with children. Instead of responding to Luddy's pedophilic behavior, they concealed and ignored it. Bishop Hogan and the Diocese knew Luddy's history and were in a position to prevent him from repeating it, yet for years they willfully allowed him to

> go on molesting children with impunity. Their inaction in the face of such a menace is not only negligent, it is reckless and abhorrent. Hence, Bishop Hogan and the Diocese are as responsible as Luddy for the harm done to Michael, or, as the jury found, even more liable than the molester himself.

Id. at 65, 742 A.2d at 1059.

The central issue on appeal to the Supreme Court in Hutchison was the privilege element of the location requirement in Section 317(a)(i). The Superior Court had reversed the jury verdict on the grounds that the motel room, the site of the assaults which were not time-barred, was not owned or controlled by the church. The Supreme Court rejected this reasoning and explained that neither ownership of the premises nor the priest's purpose in entering the room was dispositive: "What Luddy did or intended to do once he was in the motel room is irrelevant. Obviously, no one is ever privileged to enter a room for the purpose of sexually abusing someone. The issue is not what [the priest]

intended to do once he entered the room, but how he gained access to the room in the first place, i.e., because of his position as a priest or for some other reason." Id. at 67, 742 A.2d at 1060. The jury could properly have found that the priest was privileged to enter the motel room only as a priest and spiritual advisor. The bishop himself testified: "If you're a priest, you're a priest twenty-four hours a day, every day of the year." Id. at 69, 742 A.2d at 1062. Moreover, the jury could have reasonably concluded that it was the defendant's status as a priest that created and perpetuated the relationship that afforded him access to the plaintiff's motel room. Accordingly, the privilege element of Section 317(a)(i) was satisfied and the jury's verdict against the diocese and the bishop under Section 317 was legally sustainable. Id. at 69-70, 742 A.2d at 1062.

A complete lack of supervision may also give rise to employer liability. In a case involving

allegations of fraud by a home builder, the Superior Court held that "the total absence of supervision once on the job exposes the employer/defendant to 'constructive notice' that [the employee] was engaging in activity mushrooming into criminal behavior . . ." Heller v. Patwil Homes, Inc., 713 A.2d 105, 109 (Pa. Super. 1998).

IV. Negligence Per Se

At the time that Doe was being abused, there was in effect in Pennsylvania a law called the Child Protective Services Act which requires persons, including members of the clergy, to report suspected instances of child abuse to appropriate governmental officials. That statute reads as follows:

> Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect, on the basis of their

> medical, professional or other training and experience, that a child coming before them in their professional or official capacity is an abused child.

23 Pa. C.S.A. § 6311(a).[2] The Child Protective Services Act also requires that persons in charge of an institution or their designated agents relay reports of abuse that are communicated to their subordinates. That portion of the statute reads as follows:

> Whenever a person is required to report under subsection (b) in the capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, that person shall immediately notify the person in charge of the institution, school, facility or agency or the designated agent of the person in charge. Upon notification, the person in charge or the designated agent, if any, shall assume the responsibility and have the legal obligation to report or cause a report to be made in accordance with the section 6313. . . .

23 Pa. C.S.A. § 6311(c). The reports are to be made to

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[2] The act was amended as of May 29, 2007. The language cited above was included in the statute that was in effect on the dates that Doe was harmed.

the Department of Public Welfare or to the appropriate county agency pursuant to the procedure set forth in 23 Pa. C.S.A. § 6313. Prior to May 29, 2007, a person or official who willfully failed to report a case of suspected child abuse commits a summary offense for the first violation and a misdemeanor of the third degree for a second or subsequent violation. 23 Pa. C.S.A. § 6319.

Persons required to make a report to government officials under the Child Protective Services Act include "any member of the clergy." 23 Pa. C.S.A. § 6311(b). It has already been decided that the individual Defendants, including Defendants Bishop James C. Timlin and Rev. Joseph R. Kopacz, qualify as "members of the clergy" who are required to report under the statute and that all of the Defendants were in sufficient contact with Doe to bring them within the reporting requirements of the statute. See Doe v. Liberatore, 478 F. Supp.2d 742, 764 (M.D. Pa. 2007).

Violation of a statute like the Child Protective Services Act results in negligence per se where the statute creates a duty that has been breached and such negligence is the proximate cause of the injury complained of. See J.E.J. v. Tri-County Big Brothers/Big Sisters, Inc., 692 A.2d 582, 585 (Pa. Super. 1997). The Pennsylvania Superior Court explained the concept of negligence per se as follows:

> The concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm. A plaintiff, however, having proven negligence per se, cannot recover unless it can be proven that such negligence was the proximate cause of the injury. Moreover, in analyzing a claim based on negligence per se, the purpose of the statute must be to protect the interest of a group of individuals, as opposed to the general public, and the statute must clearly apply to the conduct of the defendant.

Id. A.2d at 585.

The Child Protective Services Act dictates the duty of care required of someone in the same situation as the Defendants in this case. Their sloughing off of responsibility for reporting concerns regarding Doe is precisely the harm that the statute was intended to prevent. The inaction by the Diocese of Scranton, Sacred Heart of Jesus Church, Bishop Timlin and Fr. Kopacz constitutes a clear violation of the obligation imposed by 23 Pa. C.S.A. § 6311 and is sufficient to support a finding of negligence per se. See, e.g., Jordan v. Philadelphia, 66 F. Supp.2d 638, 644 (E.D. Pa. 1999) (violation of statute gives rise to negligence per se where statute creates duty that was breached and negligence is proximate cause of injury).

V. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant, by extreme and outrageous conduct,

intentionally or recklessly caused him to suffer severe emotional distress and resulting bodily harm. Johnson v. Caparelli, 425 Pa. Super. 404, 412, 625 A.2d 668, 671-72 (1993), appeal denied, 538 Pa. 635, 647 A.2d 511 (1994). The conduct must be outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Id. Sexual abuse of a minor by a priest is, of course, sufficiently extreme and outrageous to permit recovery by the minor under a theory of intentional infliction of emotional distress. Id. at 412, 652 A.2d at 672.

VI. Breach of Fiduciary Duty

Section 874 of the Restatement (Second) of Torts provides that "[a] person standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship." Restatement (Second) of Torts § 874. Comment (a) to that section states: "A

fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts at Comment a. The Pennsylvania Supreme Court has held that a fiduciary or confidential relationship exists "whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on the one side, or weakness, dependence or justifiable trust, on the other." In re Estate of Clark, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976) (citations omitted). Pennsylvania recognizes a fiduciary duty claim where a minor child is entrusted to the care of a member of the clergy to participate in church activities and the minor child is sexually molested during the entrustment. See, e.g., Doe, 478 F. Supp.2d at 772-73.

VII. Punitive Damages

The Pennsylvania Supreme Court recently reaffirmed the standard for imposition of punitive damages as follows:

> "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Feld v. Merriam, 506 Pa. 383, 485 A.2d 742, 747 (1984) (quoting Restatement (Second) of Torts § 908(2) (1979); see also Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355, 358 (1963). As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. See SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 587 A.2d 701, 704 (1991); Feld, 485 A.2d at 747-48; Chambers, 192 A.2d at 358. See also Restatement (Second) of Torts § 908, comment b. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800, 803 (1989); Restatement (Second) of Torts § 908(1) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a

> person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.") Additionally, this Court has stressed that, when assessing the propriety of the imposition of punitive damages, "the state of mind of the actor is vital. The act or failure to act, must be intentional, reckless or malicious." See Feld, 485 A.2d at 748; see also Martin v. Johns-Mansville Corp., 508 Pa. 154, 494 A.2d 1088, 1097 n.12 (1985) (plurality opinion).

Hutchison v. Luddy, 582 Pa. 114, 121-22, 870 A.2d 766, 770-71 (2005). The Hutchison Court went on to describe the distinction between persons who know or have reason to know of facts which create a high degree of risk of physical harm to another and act with deliberate indifference to that risk and persons who know or have reason to know of facts which create a risk but do not realize or appreciate the high degree of risk involved although a reasonable person in his position would do so. Id. at 122-23, 870 A.2d at 771. Only the first type of reckless conduct is sufficient to create a jury question on the issue of punitive damages. The

Hutchison Court explained:

> [I]n Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.

Id. at 124, 870 A.2d at 772.

In that case, the Supreme Court reversed the decision of the Superior Court which held that punitive damages are never available for claims of negligent supervision based on Section 317. The Supreme Court explained that there is nothing in law or logic to prevent a plaintiff in a case sounding in negligence from undertaking the additional burden of attempting to prove that the defendant's conduct was also outrageous and therefore warrants an award of punitive damages:

> The fact that a cause of action bottomed on negligence does not require proof of the heightened showing of

> culpability necessary to sustain punitive damages in order to secure the underlying compensatory damages does not mean that punitive damages --- as an element of damages --- should be deemed automatically unavailable, even if the conduct of the defendant(s) went well beyond negligence and into the realm of the outrageous. The penal and deterrent purpose served by an award of punitive damages is furthered when the outrageous conduct occurs in a case sounding in negligence no less than when an intentional tort is at issue.

Id. at 124, 870 A.2d at 772. Thus, "there is no general proscription in law against pursuing punitive damages in the Section 317 context, where the facts so warrant" and punitive damages may properly be awarded in connection

with a claim of negligent supervision. Id. at 126, 870 A.2d at 773.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DANIEL T. BRIER, hereby certify that a true and correct copy of the foregoing Trial Memorandum was served upon the following counsel of record by electronic mail on this 5th day of November, 2007:

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